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June 23, 1998

VIA FEDERAL EXPRESS

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: *Ex Parte* Reference to CC Docket No. 98-78 and CCB/CPD 98-16

Dear Ms. Salas:

Pursuant to Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a) (1997), this is to provide an original and one copy of a notice of an *ex parte* reference made today in the above-referenced proceedings on behalf of USN Communications, Inc. ("USN"), by the undersigned, to Michael H. Pryor and staff of the Common Carrier Bureau. During the meeting, USN briefly referred to its previously-filed comments in the above-referenced proceedings, as well as related comments filed with the New York Public Service Commission relating to Case 98-C-0690. Copies of the referenced materials are attached to this letter.

Should any further information be required with respect to this *ex parte* notice, please do not hesitate to contact me at 312/906-3802. I would also appreciate it if you would date-stamp the enclosed extra copy of this filing and return it to me by mail in the enclosed self-addressed stamped envelope.

Very truly yours,

Ellen C. Craig
Vice-President, Regulatory Affairs

Enclosures
cc (w/ enc.):Michael H. Pryor

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May 12, 1998

BY HAND

Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: *Reply Comments of USN Communications, Inc.: CCB/CPD 98-16*

Dear Secretary Salas:

Please find enclosed for filing in the above-referenced matter an original and four copies of the Reply Comments of USN Communications, Inc. Please date-stamp and return to the messenger the enclosed extra copy of the Reply Comments.

Thank you for your attention to this matter.

Sincerely,

Tony Petrilla

Antony Richard Petrilla

Counsel for USN Communications, Inc.

Enclosure

cc: Chief, Competitive Pricing Division
International Transcription Services
Russell Blau, Esq.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF	
Petition of the Telecommunications Resellers Association for Declaratory Ruling that Voice Messaging Services Are Telecommunications Services that Must be Made Available for Resale at Wholesale Rates Pursuant to Section 251(c)(4) of the Communications Act of 1934, as Amended	CCB/CPD 98-16

REPLY COMMENTS OF USN COMMUNICATIONS, INC.

USN Communications, Inc. ("USN"), through its counsel and pursuant to the Commission's *Public Notice* (dated March 17, 1998), hereby submits its reply comments on the above-captioned Petition of the Telecommunications Resellers Association ("TRA").

INTRODUCTION AND SUMMARY

USN believes that voice messaging service ("VMS") should be available to competitive local exchange carriers ("CLECs") for resale. The initial comments of incumbent local exchange carriers ("ILECs") in this proceeding uniformly demonstrated ILECs' unwillingness to sell VMS to competitors for resale. *See, e.g.*, BellSouth Comments, at 7 (accusing CLECs of seeking a "handout"); Ameritech Opposition, at 14; Bell Atlantic Comments, at 1; U S WEST Comments, at 11. Apparently, the position of ILECs extends even to selling VMS to CLECs at full retail rates.[1] MCI Comments, at 3; Comments of Hyperion, Logix, RCN, and US Xchange, at 10 n. 38; USTA Opposition, at 9 ("There is no basis upon which to require that ILECs make voice messaging service available for resale, at wholesale rates *or otherwise*.") (emphasis added). Some CLECs, of course, condemned this behavior as discriminatory and unnecessarily disruptive in the market. Conectiv Comments, at 2-3; Comments of Hyperion, Logix, RCN, and US Xchange, at 10-12.

USN agrees that VMS must be made available for resale and, in these reply comments, provides an antitrust analysis of ILECs' discriminatory conduct. While the Commission is not charged with enforcing the antitrust laws, it has the responsibility to ensure the public interest (which includes taking measures to avert antitrust violations),[2] and thus it must consider these antitrust arguments in its deliberations on TRA's Petition. In refusing to sell VMS to CLECs, ILECs: (1) have monopolized VMS and refused to deal with competitors, in violation of Section 2 of the Sherman Act;[3] and (2) have failed to make an essential facility available to competitors.

[1] The antitrust principles discussed in these Reply Comments apply equally regardless of whether VMS is categorized as a "telecommunications service" or an "information service." USN does not address the issue of whether VMS must be provided at a wholesale discount under 47 U.S.C. § 251(c)(4).

[2] 47 U.S.C. § 201(b) (1938) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter [Title II of the Act].").

[3] The Sherman Antitrust Act, 15 U.S.C. § 1 *et seq*. (1990) ("Sherman Act").

ARGUMENT

I. AS MONOPOLISTS OF VMS, ILECs CANNOT REFUSE TO DEAL WITH COMPETITORS SEEKING TO PURCHASE VMS

Courts interpreting Section 2 of the Sherman Act,[4] which makes it unlawful for an entity to monopolize a particular industry, have held that monopolists may not refuse to deal with competitors, in the absence of a "normal business purpose." *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585, 608 (1985). The seminal case in this area of antitrust law, *Aspen Skiing*, dealt with the refusal of a monopolist operator of a ski resort to cooperate with its competitor in offering a joint lift ticket to consumers. *Id.*, 472 U.S. at 592-93. In previous years, the two companies had offered a single lift ticket that entitled the purchaser to use the facilities of both resorts. *Id.*, 472 U.S. at 591. In an effort to discourage skiers from patronizing its competitor, the monopolist refused to participate in the joint lift ticket arrangement, except upon utterly unreasonable terms to the competitor, and even rejected the attempts of the competitor to purchase its lift tickets at full retail price. *Id.*, 472 U.S. at 593-94. The Court found that the monopolist had violated Section 2 of the Sherman Act because it could offer no valid business reason for refusing to deal with its competitor.[5] *Id.*, 472 U.S. at 608-09.

The case before the Commission is remarkably similar to *Aspen Skiing*. As with the

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[4] 15 U.S.C. § 2 (1990).

[5] The Supreme Court ruled similarly in an earlier case in which a monopolist newspaper refused to deal with customers that also advertised with a competitor radio station. *Lorain Journal Company v. United States*, 342 U.S. 143 (1951). Based upon the monopolist's reason for its refusal — the desire to regain monopoly market share that it had lost to the radio station — the Court held that the monopolist had attempted to monopolize in violation of Section 2 of the Sherman Act. *Id.*, 342 U.S. at 152.

monopolist ski resort operator, ILECs are monopolists — they possess a monopoly over VMS provided along with retail local exchange service (as well as a monopoly over local exchange service itself).[6] ILECs and CLECs seek to sell an underlying product (local exchange service) to consumers, just as the ski resorts each sought to sell skiing services to customers. CLECs wish to ensure that their underlying product is competitive, in the same manner as the competitor ski resort desired, by accessing the facilities of the monopolist (in this case, facilities for providing VMS). ILECs have refused to sell VMS to CLECs and are therefore indistinguishable from the monopolist ski resort operator that refused to sell lift tickets to its competitor.

For ILECs to escape the reach of *Aspen Skiing*, they must show that they have an "efficiency justification" for their refusal to deal. *Id.*, 472 U.S. at 608. In other words, they must demonstrate that they can be more efficient by not dealing with competitors. None of the ILEC comments submitted in this proceeding attempts to make any such argument — nor could they, for resale of VMS to competitors not only recovers stranded investment associated with previously provisioned VMS customers, but it also translates into more profits for ILECs. Thus, it is patently clear that ILECs refuse to deal with CLECs simply to prevent them from providing a competitive retail service offering. *See, e.g.*, SBC Comments, at 12 ("Entities insisting on the resale of voice mail are simply unwilling to shoulder the risk and to make the investment to provide their own capability."). The Court in *Aspen Skiing* flatly rejected such an excuse for refusing to deal with competitors: "the evidence supports an inference that [the monopolist ski

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[6] Although large customers that own PBXs are able to operate their own VMS systems, the vast majority of subscribers to POTS lines rely on the ILEC to provide VMS. In regard to these customers, ILECs indisputably are monopolists of VMS.

resort operator] was willing to sacrifice short-run benefits . . . in exchange for a perceived long-run impact on its smaller rival." *Aspen Skiing*, 472 U.S. at 610-11. ILECs similarly seek to sacrifice short-run profit margins in an effort to eliminate long-run competition.

The *Aspen Skiing* Court also examined the extent to which the refusal to deal affected consumers either positively or negatively. *Aspen Skiing*, 472 U.S. at 605 ("it is relevant to consider [the refusal's] impact on consumers"). The Court considered an adverse impact on consumers to be additional support for a finding of a Sherman Act violation. *Aspen Skiing*, 472 U.S. at 606-07. In the case at hand, ILECs cannot argue that their refusal to deal in regard to VMS has anything but a negative impact on consumers. When a competitor is unable to resell VMS and unable to provide its own VMS platform (because, as argued below, it is economically infeasible to do so), consumers have fewer choices both for VMS and for competitive local service. ILEC refusals to deal negatively impact consumers, CLECs, and short-term ILEC profits, while having positive implications only for ILECs' long-term monopoly profit margins, which is precisely reflective of the type of concerns that led to regulation of monopolies and the antitrust laws in the first place.

In sum, the Commission should recognize in this proceeding that the ILECs' refusal to provide VMS to competitors violates Section 2 of the Sherman Act.

II. VMS IS AN ESSENTIAL FACILITY THAT ILECS MUST MAKE AVAILABLE TO COMPETITORS

Courts also have required firms that control "essential facilities" to make them available to competitors on a nondiscriminatory basis under Section 2 of the Sherman Act. *See, e.g., United States v. Terminal Railroad*, 224 U.S. 383, 410-11 (1912); *Fishman v. Wirtz*, 807 F.2d

520, 539 (7th Cir. 1986); *MCI Communications Corp. v. American Telephone and Telegraph Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1982) ("a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market to another"); *Byars v. Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1979). There are four elements to liability under the essential facilities doctrine:

> (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility [to the competitor].

MCI, 708 F.2d at 1132-33. As demonstrated below, VMS is an essential facility to which ILECs have denied CLECs access.

First, the VMS facilities at issue here are in the control of ILECs, who are monopolists of the VMS facilities.

Second, VMS meets the criteria for an essential facility. As shown in their initial comments, CLECs need to be able to offer VMS to compete with ILECs. MCI Comments, at 4-6; Conectiv Comments, at 4-6; Comments of Hyperion, Logix, RCN, and US Xchange, at 4-7; *see Wirtz*, 807 F.2d at 539 (an essential facility is a facility "to which access is necessary if one wishes to compete"). Moreover, the costs to CLECs of duplicating the ILEC's VMS are so significant that it would be impractical and unreasonable to do so. MCI Comments, at 5; Comments of Hyperion, Logix, RCN, and US Xchange, at 5-6 ("CLECs would incur up-front costs of $125,000 for each platform serving between 2000 and 3000 customers") ("With approximately 25 to 30 central offices in a typical metropolitan area, CLECs in Massachusetts would be required to pay $8,625 per month for SMDI and one-time fees of $37,500 before even rolling out VMS to [its first customer]."); *see Wirtz*, 807 F.2d at 539 ("To be essential, 'a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants.'"); *see also* Conectiv Comments, at 5-6 (the costs of offering VMS with a message waiting indicator comparable to Bell Atlantic's "would place Conectiv at yet another serious competitive disadvantage").[3]

Third, it is undisputed that ILECs generally have refused to provide VMS to CLECs reselling local exchange service, unless ordered by regulatory authorities.[4] For example, VMS is available for resale in the state of New York only because the New York Public Service Commission ordered the New York Telephone Company to tariff VMS for resale. But Bell Atlantic refuses to sell VMS to CLECs in other Bell Atlantic states where state commissions have been less vigilant to require such resale.

Finally, there are no comments before the Commission that claim that it would be technically infeasible to provide VMS to CLECs reselling an ILEC's local exchange service. Indeed, as noted above, it is done in some states and removing VMS from an existing account actually makes the provisioning of the resold account more difficult. ILECs, therefore, can

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[3] In evaluating the status of VMS as an essential facility, the Commission should take into account customer preferences. *Wirtz*, 807 F.2d at 540. The existence of facilities alleged to be a substitute for VMS (such as answering machines or alternative VMS platforms) is irrelevant if consumers do not consider such facilities to be equivalent. *Id.* (consumer preferences favoring a well-equipped 17,000 seat basketball arena made it an essential facility despite the existence of a smaller, less-equipped arena in the same city).

[4] BellSouth's decision to provide some VMS functionalities to CLECs voluntarily is the exception to this rule and an indication of the weaknesses of the ILECs' position. BellSouth Comments, at 7 n. 12.

easily provide VMS to CLECs if ordered to do so.

ILEC refusals to provide VMS to CLECs in the instant case thus satisfy the elements of the essential facilities doctrine. Under antitrust law, ILECs have a duty to make VMS available to CLECs.

CONCLUSION

The Commission must conclude that, under the two antitrust doctrines presented above, ILECs discriminate against CLECs in the provision of basic local exchange service if they refuse to sell VMS to CLECs. The Commission should take measures to avert such discrimination, including ordering ILECs to offer VMS to resellers of local exchange service.

Respectfully submitted,

Russell M. Blau
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Dated: May 12, 1998